

CHAPTER 3: EXCEPTIONS TO DISCLOSURE

The PIA's general right of access to records is limited by numerous exceptions to the disclosure requirement. Given the PIA's policy in favor of public access, SG §10-612(a), and the requirement that the PIA "be construed in favor of permitting inspection of a record," SG §10-612(b), these exceptions should be construed narrowly. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 545, 759 A.2d 249 (2000).

The PIA's exceptions fall into three basic categories. First, exceptions in SG §10-615 authorize non-disclosure if a source of law outside the Public Information Act prevents disclosure. Second, the mandatory exceptions in SG §10-616 and §10-617 impose an affirmative obligation on the custodian to deny inspection for specific classes of records and information. Third, the exceptions in SG §10-618 allow the custodian to exercise discretion whether the specified records are to be disclosed. More than a single exception may apply to a public record and the exceptions are not mutually exclusive. *Office of the Attorney General v. Gallagher*, 359 Md. 341, 753 A.2d 1036 (2000). Many of the exceptions are an attempt by the Legislature to balance individual privacy interests against the public right of access. *University System of Maryland v. The Baltimore Sun Co.*, 381 Md. 79, 95, 847 A.2d 427 (2004).

In addition, SG §10-619 contains a "last resort" provision, which allows a custodian to deny inspection temporarily and seek court approval for authorization to withhold a record that otherwise would be subject to inspection. Unless an agency obtains a special court order under the statute to justify withholding a record, there is no basis for withholding a record other than an exception in the PIA. *See, e.g., Police Patrol Security Systems v. Prince George's County*, 378 Md. 702, 716-17, 838 A.2d 1191 (2003) (there is no discrete "public interest," "personal information," or "unwarranted invasion of privacy" exemption to PIA).

Many of the PIA's exceptions parallel exemptions in FOIA. Cases decided under similar provisions of the federal FOIA are persuasive precedents in construing the PIA. *See, e.g., Boyd v. Gullett*, 64 F.R.D. 169, 176 (D. Md. 1974); *Equitable Trust Co. v. State*

Comm'n on Human Relations, 42 Md. App. 53, 399 A.2d 908 (1979), *rev'd on other grounds*, 287 Md. 80 (1980); 58 *Opinions of the Attorney General* 53, 58-9 (1973).

A. *Exceptions Based on Other Sources of Law*

Under SG §10-615(1), inspection is to be denied where the public records are “privileged or confidential by law.” Furthermore, under SG §10-615(2), the custodian must deny inspection if the inspection is contrary to:

- State statute – SG §10-615(2)(i);
- federal statute or regulation – SG §10-615(2)(ii); or
- a rule adopted by the Court of Appeals or order of a court of record – SG §10-615(2)(iii) and (iv).

State Statutes

Many State statutes bar disclosure of specified records. Some examples include Criminal Procedure Article, §10-219 (restrictions on dissemination of “criminal history record information”), *see* 92 *Opinions of the Attorney General* 26, 30–37 (2007); §3-8A-27 of the Courts and Judicial Proceedings Article (protection of police records pertaining to minors), *see* 85 *Opinions of the Attorney General* 249 (2000) (protection under statute only applies to records concerning matter that could bring minor within jurisdiction of the juvenile court); §3-602 of the Correctional Services Article (inmates’ case records), *see* 86 *Opinions of the Attorney General* 226 (2001) (protection does not extend to projected release date for mandatory supervision); and §16-118(d) of the Transportation Article (records of Medical Advisory Board are confidential), *see* 82 *Opinions of the Attorney General* 111 (1997) (person in interest is entitled to MVA information relating to the person’s fitness to drive, subject to limited exceptions). Tax information is protected under §13-202 of Tax-General Article and §1-301 of the Tax-Property Article. *See MacPhail v. Comptroller*, 178 Md. App. 115, 941 A.2d 493 (2008); Letter of Assistant Attorney General Kathryn M. Rowe to Ms. Ann Marie Maloney (December 15, 2004). Disclosure of “medical records” is restricted by the Maryland Confidentiality of Medical Records Act, §4-301 *et seq.* of the Health-General Article. *See* 90 *Opinions of the Attorney General* 45, 48-52 (2005). In light of SG §10-615(2)(i), statutes of this kind bar disclosure despite the otherwise broad right of access

given by the PIA. *See, e.g., 81 Opinions of the Attorney General* 164 (1996) (applying statutory accountant-client privilege).

Federal Statutes

Similarly, a federal statute or regulation may prevent disclosure of a record. For example, the Family Educational Rights and Privacy Act of 1974 (FERPA) restricts access to student records. *See 92 Opinions of the Attorney General* 137 (2007). Also, states must limit disclosure of information concerning food stamp applicants. 7 U.S.C. §2020(e)(8). Certain critical infrastructure information and homeland security information that the federal government shares with the State or local governments may not be disclosed under the PIA. *See* 6 U.S.C. §§133(a)(1)(E) and 482(e), respectively. These exceptions are basically statements of the federal preemption doctrine. *See 88 Opinions of the Attorney General* 205 (2003) (addressing confidentiality of medical records under HIPAA and State law).

Court Rules

A rule adopted by the Court of Appeals or order of a court of record can also prevent disclosure of a record. A court rule fitting this description is Maryland Rule 4-642, which requires court records pertaining to criminal investigations conducted by a grand jury or by a State's Attorney pursuant to Article 10, §39A of the Maryland Code, to be sealed and protects against disclosure of matters occurring before a grand jury. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999) (discussing Rule 4-642). Similarly, the Maryland Rules require that a search warrant be issued "with all practicable secrecy." A public official or employee who improperly discloses search warrant information prematurely may be prosecuted for contempt. Maryland Rule 4-601; 87 *Opinions of the Attorney General* 76 (2002) (absent court order, State's Attorney's Office may not make available to a community association the address and date of execution of a search warrant relating to drug violations for community association's use in bringing a drug nuisance abatement action if information has not otherwise been made public). Another example of a court order that would fall within this exception is an order to seal records in a divorce or custody case.

A rule that permits limited disclosure does not necessarily open a record to the public. For example, Maryland Rule 16-723(e)(3) permits Bar Counsel to disclose to a complainant, on request, the status of an investigation and any disciplinary or remedial proceedings resulting from information from the complainant. In interpreting a predecessor to the current

rule, the Court of Appeals held that, although it allows limited disclosure to the complainant, it does not make the information subject to general disclosure under the PIA. *Attorney Grievance Commission v. A.S. Abell Co.*, 294 Md. 680, 452 A.2d 656 (1982).

The Court of Appeals has adopted rules governing access to various categories of court records. Maryland Rule 16-1001 *et seq.* The new rules took effect October 1, 2004 and were to be applied, insofar as practicable, to all actions and matters pending on that date. The rules define four classes of court records: administrative records, business license records, notice records, and case records. Rule 16-1001. Inspection of notice records (*e.g.*, records filed among the land records by the clerk of a circuit court) may not be denied once the record is recorded and indexed. Rule 16-1004(a). Generally, access to administrative and business licensing records is governed by the provisions in the PIA itself. Rule 16-1004(b)(1). Access to case records is addressed in rules 16-1005 through 16-1007. A person who files a case record is to inform the record custodian (*e.g.*, a court clerk) in writing whether, in the person's judgment, any part of the case record or information in the case record is confidential under the rules. The custodian is not bound by the person's determination. However, the custodian is entitled to rely on a person's failure to identify information in a case record as confidential under the rules. Rule 16-1010(a). On request for inspection of a record, the custodian may seek a preliminary judicial determination on whether the record is subject to inspection. Rule 16-1011. A person who filed a case record before October 1, 2004, may advise the custodian whether any part of the record is not subject to inspection. Rule 16-1010(b)(2).

Privileges

The "privileged or confidential by law" exception under SG §10-615(1) refers to traditional privileges like the attorney-client privilege and the doctrine of grand jury secrecy. For example, the Court of Appeals held that a public defender who was the custodian of a public record consisting of client information must disclose the requested information unless, in doing so, the lawyer would violate Rule 1.6 of the Rules of Professional Conduct. That is, if the requested public record was "information relating to representation of a client" under Rule 1.6, and disclosure would place the attorney in violation of the rule, then the record would be considered confidential under SG §10-615(1). *Harris v. Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993). While records subject to the attorney-client privilege must be protected under SG §10-615(1), the privilege may be waived by the party entitled to assert it. *Caffrey v. Dep't. of Liquor Control for Montgomery County*, 370 Md. 272, 304, 805 A.2d 168 (2002) (Montgomery County Charter provision effectuated limited waiver of

attorney-client privilege). *See also* 64 *Opinions of the Attorney General* 236 (1979) (applying common law doctrine of grand jury secrecy).

Another example of information protected by a recognized privilege is confidential executive communications of an advisory or deliberative nature. *See Stromberg Metal Works, Inc. v. University of Maryland* 382 Md. 151, 161-63, 854 A.2d 1220 (2004); *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249 (2000); *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980); *Laws v. Thompson*, 78 Md. App. 665, 690-93, 554 A.2d 1264 (1989); 66 *Opinions of the Attorney General* 98 (1981). The Court of Appeals has stated that the executive privilege encompassed within SG §10-615(l) shields records made in connection with the deliberative decision-making process used by high executive officials such as the Governor and the Governor's immediate advisors – although the actual custodian of the records may be someone other than the official holding the privilege. *Stomberg*, 382 Md. at 161-63. The executive privilege encompassed within SG §10-615(1) is not limited to the executive branch of government; it extends to the Chief Judge of the Court of Appeals and presiding officers of the General Assembly as well. *Hamilton v. Verdow*, 287 Md. 544, 553-54 n.3, 414 A.2d 914 (1980). Records that reveal the deliberative process of other government officials may be protected under a broader common law deliberative process privilege that is encompassed by the inter and intra-agency exemption in SG §10-618(b). *Stromberg*, 382 Md. at 163-67; *see* Part D.1 of this Chapter below.

Not every executive communication is itself advisory or deliberative. In *Office of the Governor*, the Court of Appeals rejected a blanket claim of executive privilege for telephone and scheduling records sought by the newspaper. Because these documents were not of an advisory or deliberative nature, the Governor was not entitled to a presumptive privilege. However, the Court instructed the trial court on remand to consider whether individual records were privileged because disclosure of particular phone numbers or scheduling records in “identified special circumstances” would interfere with the deliberative process of the Governor's office. The Court recognized that the passage of time might mitigate any harmful effect disclosure might have on the current deliberations of the executive. 360 Md. at 561-65.

The Speech and Debate Privilege provided to legislators by the Maryland Constitution may also prohibit disclosure of records of legislators as well as records of a legislative agency. *See* Maryland Constitution, Article III, §18; Declaration of Rights, Article 10; letter of Advice to William Ratchford from Assistant Attorney General Richard E. Israel (June 29,

1993). Although the constitutional protections applicable to State legislators do not extend to members of county or municipal governing bodies, they do possess a common law privilege when acting in a legislative capacity that is considered co-extensive in scope. *Montgomery County v. Schooley*, 97 Md. App. 107, 114-15, 627 A.2d 69 (1993); *see also* Letter of Assistant Attorney General Richard E. Israel to Senator David R. Craig (March 4, 1998). *See also* Part D1 of this Chapter, addressing inter- and intra-agency memoranda, below.

Local Ordinances and Agency Regulations

An ordinance enacted by a local government does not constitute other “law” for purposes of §10-615(1) and cannot by itself supply a basis for withholding a public record otherwise available under the PIA. *Police Patrol Security Systems v. Prince George’s County*, 378 Md. 702, 710, 713-15, 838 A.2d 1191 (2003); *see also* 86 *Opinions of the Attorney General* 94, 106-07 (2001). However, a confidentiality provision in a local ordinance that is derived from a State statute can be a basis for denying access to records. *See* 92 *Opinions of the Attorney General* 12 (2007) (confidentiality provision in local ethics ordinance based on model ordinance under the Public Ethics Law).

Conversely, local law may not authorize release of a public record if disclosure is expressly prohibited by the PIA. *Police Patrol Security Systems*, 378 Md. at 712; *see also* *Caffrey v. Dep’t. of Liquor Control for Montgomery County*, 370 Md. 272, 303, 805 A.2d 268 (2002). An exception would be where a local law required disclosure in a manner authorized by a State statute other than the PIA. *See, e.g.*, 71 *Opinions of the Attorney General* 282 (1986) (financial disclosures pursuant to county ethics ordinance). However, access to public records that are subject to discretionary exemptions under SG §10-618 may be affected by local law. Thus, “home rule counties may direct or guide the exercise of this discretion, or even eliminate it entirely, by local enactment.” *Police Patrol Security Systems*, 378 Md. at 712; *see also*, *Caffrey v. Dep’t. of Liquor Control for Montgomery County*, 370 Md. at 305 (permissible denials of PIA subject to waiver by county). The same rule would apply to enactments of municipal corporations. 86 *Opinions of the Attorney General* 94, 107 (2001) (at best, a municipal ordinance prohibiting disclosure of certain records could be construed as instructing custodians to exercise whatever discretion PIA might give them).

Nor may an agency regulation provide an independent basis for withholding a public record (except for the special case of “sociological data,” discussed in Part C.1 of this Chapter, below). A contrary interpretation would allow State agencies at their election to

undermine the Act. *Cf. Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983) (for this reason, the court gave little weight to a FDA regulation broadly interpreting the “trade secret” exemption). Additionally, had the General Assembly intended to give this effect to a State regulation, it would have been included in the list in SG §10-615, which does mention federal regulations.

B. Required Denials – Specific Records

Under SG §10-616, the custodian must deny the inspection of certain specified records. However, any of these records may be available for inspection if “otherwise provided by law.” SG §10-616(a). Thus, if another source of law allows access, then an exception in SG §10-616 does not control. *See 79 Opinions of the Attorney General* 366 (1994) (although personnel records and other information regarding employees in Baltimore City School System would otherwise be nondisclosable, disclosure was authorized by virtue of a federal district court order).

The converse is also true. SG §10-616 may allow access to records but “other law” may deny access. For example, names, addresses, and phone numbers of students may be disclosed to an organization such as a PTA under SG §10-616(k). However, the Family Educational Rights and Privacy Act of 1974, the “Buckley Amendment,” 20 U.S.C. §1232g, is “other law” that supersedes the PIA. Under this federal statute, a student or parent may refuse to allow the student’s name and address to be released by refusing to allow it to be classified as directory information. If they do not refuse, the name and address are considered directory information and may be released. As to the types of records protected under the Buckley Amendment, *see Kirwan v. The Diamondback*, 352 Md. 74, 89-94, 721 A.2d 196 (1998) (federal statute governing “education records” does not cover records of parking tickets or correspondence between the NCAA and the University of Maryland, College Park Campus). *Cf. Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992) (Family Educational Rights and Privacy Act and Maryland regulations concerning the disclosure of student records do not exclude a student’s education records from discovery in litigation).

The following categories of records are listed in SG §10-616:

1. Adoption and welfare records

Under SG §10-616(b) and (c), adoption records and welfare records, respectively, on an individual person are protected. *See 71 Opinions of the Attorney General* 368 (1986)

(discussing limited conditions under which information about the handling of a child abuse case by a local department of social services may be disclosed); *see also* 89 Opinions of the Attorney General 31, 43 & n.7 (2004).

2. Personnel records

Under SG §10-616(i), “personnel records” of an individual are protected; however, such records are available to the person who is the subject of the record and to the officials who supervise that person. An agency may not generally share personnel records with other agencies; however, it is implicit in the personnel records exemption that another agency charged with responsibilities related to personnel administration have access to those records to the extent necessary to carry out its duties. 86 *Opinions of the Attorney General* 94, 108-9 (2001).

The PIA does not define “personnel records,” but it does indicate the type of documents that are covered: applications, performance ratings, scholastic achievement information. “Although this list was probably not intended to be exhaustive, it does reflect a legislative intent that ‘personnel records’ means those documents that directly pertain to employment and an employee’s ability to perform a job.” *Kirwan v. The Diamondback*, 352 Md. 74, 82-84, 721 A.2d 196 (1998) (rejecting argument that information concerning parking tickets constitutes personnel record); *see also* 82 *Opinions of the Attorney General* 65, 68 (1997) (purpose of personnel record exemption is to preserve privacy of personal information about a public employee accumulated during employment). “The obvious purpose of SG §10-616(i) is to preserve the privacy of personal information about a public employee that is accumulated during his or her employment.” 65 *Opinions of the Attorney General* 365, 367 (1980); *see also* 68 *Opinions of the Attorney General* 335, 338 (1983).

A record is not a “personnel record” simply because it mentions an employee or has some incidental connection with an employment relationship. For example, a record simply indicating with whom an official met or a phone number called in connection with a possible future employment decision is not a personnel record under the PIA. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 547-48, 759 A.2d 249 (2000). Nor is directory-type information concerning agency employees a “personnel record” under SG §10-616(i). *Prince George’s County v. Washington Post Co.*, 149 Md. App. 289, 324, 815 A.2d 859 (2003) (roster listing names, ranks, badge numbers, dates of hire, and job assignments of county police officers not exempt from disclosure as “personnel records”). Furthermore, an employment contract, setting out the terms and conditions governing a public employee’s

entitlement to a salary, is not a “personnel record.” *University System of Maryland v. The Baltimore Sun Co.*, 381 Md. 79, 101-02, 847 A.2d 427 (2004); Letter of Assistant Attorney General Robert A. Zarnoch to Delegate Joanne Parrott (February 9, 2004). Nor is a description of a job or position considered to be a “personnel record” under §10-616(i). Attorney General Opinion 77-006 (January 13, 1977) (unpublished). Generally, a record generated by an agency that lacks supervisory authority over an employee would not qualify as a “personnel record.” *Prince George’s County v. The Washington Post Company*, 149 Md. App. 289, 331, 815 A.2d 859 (2003) (records of county human relations commission that provided recommendations to supervisory agency following public hearings on alleged police misconduct).

As to the type of records that are protected, see *Baltimore City Police Dept v. State*, 158 Md. App. 274, 282-83, 857 A.2d 148 (2004) (investigation of employee misconduct is personnel record); 79 *Opinions of the Attorney General* 362 (1994) (information related to performance evaluation of judges is not disclosable); 78 *Opinions of the Attorney General* 291 (1993) (information about a complaint filed against an employee is not disclosable); see also memorandum to Principal Counsel from Assistant Attorney General Jack Schwartz (January 31, 1995) (information about leave balances is itself considered part of an official’s personnel records and therefore is not disclosable); cf. *Dobronksi v. FCC*, 17 F.3d 275 (9th Cir. 1994) (sick leave records of an assistant bureau chief for FCC were “personnel files” under FOIA Exemption 6 but were disclosable because of that exemption’s balancing test, not found in SG §10-616(i)).

In some contexts—particularly where an agency has a special duty to inform the public—different distinctions may need to be made as to the nature of information. For example, in assessing what a public school may or should notify parents about an inappropriate relationship between a teacher and student, a 1982 opinion observed that first-hand observation or information contained in an oral report to the school may not be a personnel “record.” Also, student-related information in documentary material about the teacher may be disclosed without destroying the confidentiality of employee-related information. See 82 *Opinions of the Attorney General* 65, 67-70 (1997).

The personnel record exception is not limited to paid officials and employees; biographical information submitted by individuals seeking to serve on agency advisory committees is also protected. See Letters to Senator Brian E. Frosh and Delegate Jennie M. Forehand from Assistant Attorney General Kathryn M. Rowe (October 6, 2000). Similarly, the names of those seeking appointment to an office may not be disclosed if the information

is derived from their applications. Letter to Senator Leo E. Green from Assistant Attorney General Kathryn M. Rowe (May 13, 2002) (Names of applicants for Prince George's Board of Education not to be disclosed).

Records regarding the salaries, bonuses, and the amount of a monetary performance award of public employees may not be withheld as personnel records. 83 *Opinions of the Attorney General* 192 (1998).

3. Letters of reference

Under SG §10-616(d), letters of reference are protected. This exemption applies to all letters, solicited or unsolicited, that concern a person's fitness for public office or employment. 68 *Opinions of the Attorney General* 335 (1983). The Court of Appeals has left open the question whether a record, memorandum, or notes reflecting a telephone conversation or meeting to obtain information about a prospective appointee might come under the exception. However, a record simply indicating that a telephone conversation or meeting occurred about a prospective appointee is "certainly not a 'letter of reference.'" *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 547, 759 A.2d 249 (2000).

4. Retirement records

Under SG §10-616(g), retirement files or records are protected. This subsection, however, includes several exceptions. Under ¶4, a custodian must state whether an individual receives a pension or retirement allowance. The law also requires the disclosure of specified information concerning the retirement benefits of current and retired appointed and elected officials. See ¶6. Specific provisions are applicable to Anne Arundel County officials. See ¶7. Note that ¶3 requires a custodian to permit inspection of retirement files or records if a county by law requires an agency to conduct audits of such records. The employees of the auditing agency must keep all information confidential and must not disclose information that would identify the individuals whose files have been inspected. Retirement records may also be inspected by public employee organizations under conditions outlined in §21-504 of the State Personnel and Pensions Article. See ¶5. The law also allows the sharing of certain information for purposes of administering the State's optional defined contribution system in accordance with §21-505 of the State Personnel and Pensions Article. See ¶5. A law enforcement agency seeking the home address of a retired employee is entitled to inspect retirement records in order to contact that person on official business. ¶2(iv).

Other exceptions authorize access by a person in interest, an employee's appointing authority, and certain persons involved in administering a deceased individual's estate. ¶2(i)(1).

5. Student records

Under SG §10-616(k), school district records pertaining to individual students are protected; however, these records are available to the student and to officials who supervise the student. The custodian may allow inspection of students' home addresses and phone numbers by organizations such as parent, student, or teacher organizations, by a military organization or force, by an agent of a school or board of education seeking to confirm an address or phone number, and by a representative of a community college in the State. *See* Letter to Senator Victor Cushwa from Assistant Attorney General Christine Steiner (August 14, 1984) (names and addresses of parents of Senatorial Scholarship recipients may not be released; the PIA protects school district records about the family of a student). Even if some identifying information is stripped from the student records, the exemption would still apply if a person could readily match students with the disclosed files. Letter to Delegate Dereck Davis from Assistant Attorney General Kathryn M. Rowe (August 20, 2004). This exception may be trumped by other federal or State law that permits access to student records. 92 *Opinions of the Attorney General* 137, 146 (2007) (county auditor could have access to student records to the extent allowed by State statute authorizing audit).

6. Library circulation records

Under SG §10-616(e), public library circulation records that identify the transaction of a borrower are protected. *See* Letter to Delegate John J. Bishop from Assistant Attorney General Richard E. Israel (February 28, 1990) (FBI agents may not inspect library records unless acting pursuant to a lawfully issued search warrant or subpoena). However, another statute may provide authority for a search absent a warrant or subpoena. *See* 50 U.S.C. §1861 (authority of FBI to obtain order under USA Patriot Act for production of records in connection with certain foreign intelligence and internal terrorism investigations).

7. Motor Vehicle Administration records

Under SG §10-616(p), absent written consent of the person in interest, the Motor Vehicle Administration may not disclose "personal information" in response to a request for an individual record or as part of a list sought for purposes of marketing, solicitations, or surveys. "Personal information" is defined as "information that identifies an individual

including an individual's address, driver's license number or any other identification number, medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number." SG §10-611(f)(1). However, this definition does not include "an individual's driver's status, driving offenses, 5-digit zip code, or information on vehicular accidents." SG §10-611(f)(2). The statute includes an extensive list of exceptions whereby personal information must be disclosed. The exceptions are modeled in large part after provisions of the federal Driver's Privacy Protection Act, 18 U.S.C. §2721, *et seq.* The Motor Vehicle Administration may not disclose personal information under any circumstances for purposes of "telephone solicitation," a term defined in the PIA. SG §10-611(h).

8. RBC records filed with Insurance Commissioner

Under SG §10-616(l), records that relate to Risk Based Capital reports or plans are protected. All Risk Based Capital reports and Risk Based Capital plans filed with the Insurance Commissioner are to be kept confidential by the Commissioner, because they constitute confidential commercial information that might be damaging to an insurer if made available to competitors. These records may not be made public or subject to subpoena, other than by the Commissioner, and then only for the purpose of enforcement actions under the Insurance Code. *See* §4-310 of the Insurance Article.

9. Arrest warrants

Subject to enumerated exceptions, under SG §10-616(q), a record pertaining to an arrest warrant is not open to inspection until the warrant has been served or 90 days have elapsed since the warrant was issued. An arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation is not open to inspection until warrants for any co-conspirator have been served.

10. Police reports sought for marketing legal services

Under SG §10-616(h), police reports of traffic accidents, criminal charging documents, and traffic citations are not available for inspection by an attorney or an employee of an attorney who requests inspection for the purpose of soliciting or marketing legal services. *See also* Annotated Code of Maryland, Business Occupations & Professions, §10-604. The federal district court in Maryland has ruled that this provision is of doubtful constitutionality under the First Amendment. *Ficker v. Utz*, Civil Action No. WN-92-1466

(D.Md. Sept. 20, 1992) (order denying motion to dismiss). Subsequently, some courts have upheld state efforts to restrict access to similar public information when sought for commercial purposes while other courts have struck down such restrictions. *See* Letter to Delegate John A. Giannetti, Jr., from Assistant Attorney General Kathryn M. Rowe (February 28, 2000). *See also Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999) (rejecting facial challenge to a California statute that restricts access to the addresses of individuals arrested for purposes of selling a product or service).

11. Miscellaneous records

Other public records protected under SG §10-616 include:

- Account holders and beneficiaries under the State's College Savings Plans program – SG §10-616(n).
- Applications for certification and claims for credits filed under the Renewable Fuels Promotion Act of 2005 – SG §10-616(t).
- Certain records created or obtained by or submitted to the Maryland Transportation Authority in connection with an electronic toll collection system or an associated transaction system – SG §10-616(m).
- Certain records created or obtained by or submitted to the Maryland Transit Administration in connection with electronic fare media – SG §10-616(r).
- Department of Natural Resources' records containing personal information – SG §10-616(s).
- Hospital records relating to medical administration, medical staff, medical care, or other medical information and containing information about one or more individuals – SG §10-616(j).
- Library, archives, and museum material contributed by a private person to the extent that any limitation of disclosure is a condition of the contribution – SG §10-616(f).

- Recorded images produced by traffic control signal monitoring systems used to record vehicles entering an intersection against a red signal – SG §10-616(o).

C. Required Denials – Specific Information

Under SG §10-617, unless otherwise provided by law, the custodian must deny inspection of the part of a public record that contains the following specific information:

1. Medical, Psychological, and Sociological Data

SG §10-617(b) prevents disclosure of medical or psychological information about an individual person, as well as personal information about a person with a disability. The exception also explicitly makes confidential certain reports that local health departments receive from physicians who diagnose cases of HIV or AIDS. SG §10-617(b)(2)(iii).

Thus, medical information such as the symptoms of an ill or injured individual recorded during a call to 911 to assist in dispatch of emergency personnel is not to be released. 90 *Opinions of the Attorney General* 45 (2005). A record containing medical information need not identify an individual with absolute precision to fall within this exception, if other unredacted information permits identification of the individual with reasonable certainty. *Id.* at 54-55. Medical and psychological information is available for inspection by the person in interest to the extent permitted by Title 4, Subtitle 3 of the Health-General Article. See 71 *Opinions of the Attorney General* 297 (1986) (tape recording of involuntary admission hearing may be disclosed only to a patient or authorized representative). SG §10-617(b) does not protect from disclosure autopsy reports of a medical examiner, but does protect photographs and other documents developed in connection with an autopsy. Letter to Senator Leo E. Green from Assistant Attorney General Kathryn M. Rowe (May 30, 2003).

The exemption for personal information about an individual with a disability, which was added to the PIA in 2006, is apparently intended to restrict disclosure of addresses of community residences and group homes that serve individuals with disabilities. See Bill Review Letter of Attorney General J. Joseph Curran, Jr. to Governor Robert L. Ehrlich (May 1, 2006). An exception in the exemption related to nursing homes and assisted living facilities has raised interpretive questions. *Id.*

Section 10-617(c) forbids disclosure of “sociological information.” This basis for denial may be used only if an official custodian has adopted rules or regulations that define, for the records within that official’s responsibility, the meaning and scope of “sociological data.” The Division of Parole and Probation of the Department of Public Safety and Correctional Services, for example, has adopted regulations (COMAR 12.11.02.02.M) that define “sociological data.” While the Act itself does not define “sociological data,” it seems unlikely that the Legislature meant for agencies to withhold aggregate statistical compilations under this provision.

2. Trade Secrets; Confidential Business and Financial Information

SG §10-617(d) prevents disclosure of trade secrets, confidential commercial or financial information, and confidential geological or geophysical information, if that information is furnished by or obtained from any person or governmental unit. The comparable FOIA exemptions are similar. Under 5 U.S.C. §552(b)(4), the government need not disclose “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential.” In addition, 5 U.S.C. §552(b)(9) protects “geological and geophysical information and data, including maps concerning wells” The geological or geophysical data provision obviously is limited in scope and in practice applies only to a few Maryland agencies.

Federal cases and FOIA legislative history are highly persuasive in interpreting SG §10-617(d). 63 *Opinions of the Attorney General* 355 (1978). Sources on the scope and extent of the related FOIA exemption include: United States Department of Justice, *Freedom of Information Act Guide & Privacy Act Overview*, Exemption 4 (May 2004 ed.) (available on-line as *Freedom of Information Act Guide*, www.usdoj.gov/o4foia/foi-act.htm); O’Reilly, *Federal Information Disclosure*, Chapters 14 and 18 (3d ed. 2000); 139 A.L.R. Fed. 225; and 27 A.L.R. 4th 773. Under FOIA, a “trade secret” is considered a “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Prince George’s County v. Washington Post Co.*, 149 Md. App. 289, 312, n. 17, 815 A.2d 859 (2003), citing *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). See also 63 *Opinions of the Attorney General* 355, 359 (1978) (defining a “trade secret” as “an unpatented secret formula or process known only to certain individuals using it in compounding some article of trade having commercial value. Secrecy is the essential element. Thus, [a] trade secret is something known to only one or a few, kept from the general public, and not susceptible of

general knowledge. If the principles incorporated in a device are known to the industry, there is no trade secret ..." (footnotes, internal quotations, and citations omitted)).

Often the more difficult inquiry is what constitutes confidential commercial or financial information. To fit within SG §10-617(d), the information must be of a commercial or financial nature and it must be obtained from a person outside the agency or from another governmental unit. Information generated by the agency itself is not covered by SG §10-617(d), but it may be protected from disclosure by a different exception. *See Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 167-70, 854 A.2d 1220 (2004); *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).

In addition, a record is not confidential commercial or financial information simply because it was generated in the course of a transaction or has some other indirect connection to commercial activity. In *Office of the Governor v. Washington Post Co.*, for example, the Court of Appeals held that a record of a telephone call about an economic development project does not itself constitute confidential commercial information, although notes detailing the substance of the discussion might. 360 Md. 520, 549, 759 A.2d 249 (2000)

The problem of determining whether a document reflects confidential commercial or financial information frequently arises as a consequence of procurement bid protests. The following cases that apply FOIA Exemption 4 may be helpful in this context: *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (substantial cost savings to competitors through FOIA access to data may result in substantial competitive harm to data submitter); *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir. 1980) (disclosure of bid proposal would have chilling effect on willingness of potential bidders to submit future proposals); *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1980) (ability of competitors to calculate data submitter's future bids and pricing structure would be substantial competitive harm); *Environmental Technology, Inc. v. EPA*, 822 F. Supp. 1226 (E.D. Va. 1993) (unit price information voluntarily provided by government contractor to procuring agency was "confidential" and not subject to disclosure under FOIA, where information was of a kind that contractor would not customarily share with competitors); *Allnet Comm. Services, Inc. v. FCC*, 800 F. Supp. 984 (D.D.C. 1992) (proprietary cost and engineering data voluntarily provided by switch vendors to telecommunications companies under nondisclosure agreements were confidential under FOIA); *Cohen, Dunn & Sinclair v. General Services Administration*, Civ. No. 92-57-A (E.D. Va. Sept. 10, 1992) (pricing information was exempt because of deterrent effect on future bids and because disclosure would result in severe economic harm to some bidders); *Audio Technical Services Ltd. v.*

Department of the Army, 487 F. Supp. 779 (D.D.C. 1980) (successful bidder's customer list, design concepts and recommendations, and biographical data on key employees were exempt). For an overview of the law governing release of price information under FOIA, see McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 Public Contract Law Journal 185 (2002).

Financial or commercial information that persons are *required* to give the government should be considered confidential if disclosure of the information is likely to have either of the following effects:

(1) to impair the government's ability to obtain the necessary information in the future; or

(2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks & Conservation Assoc. v. Morton, 498 F.2d 765, (D.C. Cir. 1974). Commercial or financial information that is given to the government *voluntarily* should be considered confidential "if it is of the kind that the provider would not customarily release to the public." *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In general, the submitter of such material should be consulted *before* it is disclosed to a requester.

An opinion of the Attorney General concluded that construction drawings, submitted to a county as a prerequisite to issuance of a building permit, could not be protected from disclosure on the grounds that release would impair the government's ability to obtain the necessary information in the future. The opinion suggested that release of such drawings should be examined on a case-by-case basis, however, to determine whether disclosure would give competitors a concrete advantage in obtaining future work on that or a similar project. 69 *Opinions of the Attorney General* 231 (1984). See also *Progressive Casualty v. MAIF*, No. 83/E/1074 (Cir. Ct. for Balt. Co., February 15, 1984) (coverage and premium calculations of Maryland Automobile Insurance Fund's insureds held to be confidential commercial and financial data).

3. Home Addresses and Phone Numbers of Public Employees

SG §10-617(e) prevents disclosure of the home address or telephone number of a public employee unless the employee consents or the employing unit determines that inspection is needed to protect the public interest. Thus, the home telephone number of a State employee would be redacted from records otherwise available to a requestor. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 550, 759 A.2d 249 (2000). Public employee organizations are permitted greater access under certain conditions outlined in §21-504 of the State Personnel and Pensions Article. Also, if a public employee is a licensee, members of the General Assembly may obtain the licensee's home address pursuant to SG §10-612(c). *See* Letter of Advice to Michael A. Noonan, Esquire, from Assistant Attorney General Robert A. Zarnoch (December 23, 1993); Letters to Dr. William AuMiller from Assistant Attorney General Robert A. Zarnoch (February 21, 2005; November 29, 2000) (State legislators are entitled to names and addresses of teachers and other certified employees of county boards of education).

4. Records of an Individual Person's Finances

SG §10-617(f) protects from disclosure the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness. SG §10-617(f)(2). This exception explicitly does *not* apply to the actual compensation, including any bonus, paid to a public employee. SG §10-617(f)(1); 83 *Opinions of the Attorney General* 192 (1998).

Although the PIA does not define financial information, the listing in SG §10-617(f)(2) illustrates the type of financial information that the Legislature intended to protect. *Kirwan v. The Diamondback*, 352 Md. 74, 721 A.2d 196 (1998) (because the sanction for a parking violation is a fine rather than a debt, records of parking tickets do not fall in the same category as information about "assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness"); *see also* 77 *Opinions of the Attorney General* 188 (1992) (value or description of abandoned property should not be disclosed because it constitutes personal financial information); Opinion No. 85-011 (April 15, 1985) (unpublished) (names of municipal bond holders should not be disclosed because they constitute information about a particular financial interest of an individual); Memorandum from Jack Schwartz to Principal Counsel (August 17, 1995) (information that an individual was a lottery winner is considered a record of an individual person's finances and the Lottery

Agency was prohibited from disclosing to the press the individual's identity); Letter of Assistant Attorney General Robert A. Zarnoch to Delegate Kevin Kelly (July 18, 2007) (public records related to paper gaming profits of businesses in Allegany County not covered by this exception); 71 *Opinions of the Attorney General* 282 (1986) (county ethics ordinance requires disclosure of information ordinarily non-disclosable under SG §10-617(f)).

The rationale for this provision was explained by the Governor's Information Practices Commission:

In the performance of their duties, public agencies quite properly collect a significant amount of detailed financial information pertaining to individuals. This data is [*sic*] essential in determining eligibility for State scholarship programs, income maintenance benefits, subsidized housing programs, and many other areas.

While the Commission recognizes that this data must be available to agencies, this does not mean that such information should be available to third parties....

The Commission ... recommends that an amendment be added to the Public Information Act specifying that personally identifiable data which is financial in character not be disclosed, unless otherwise provided by law. It is important to emphasize the last phrase, "unless otherwise provided by law." Enactment of the above recommendation would have no impact whatsoever on those personally identifiable financial records which the Legislature has determined should be available for public inspection. For example, the salaries of public employees would continue to be available under the Public Information Act; the Commission completely supports the disclosure of this information. The Commission's recommendation, therefore, would only affect financial data in those record systems, ... which have been inadvertently disclosed.

Governor's Information Practices Commission, Final Report 534-35 (1982).

5. Occupational and Professional Licensing Records

SG §10-617(h) contains a general privacy protection for occupational and professional licensing records on individual persons. Again, this amendment resulted from a recommendation of the Governor's Information Practices Commission. In explaining its recommendation, the Commission stated:

The observation was made earlier in this report that the formulation of sound public policy in the area of information practices requires the striking of a delicate balance among competing interests. The occupational and professional licensing field provides a good illustration of this dictum. The various licensing boards throughout the State need to collect a sufficient amount of personally identifiable information in order to assess the qualifications of candidates. The public has a right to examine certain items in licensure files to be assured that specific licensees are competent and qualified. Licensees, in turn, have a right to expect that boards limit themselves to the collection of relevant and necessary information, and that strict limitations are placed on the type of personally identifiable data available for public inspection.

...

The Information Practices Commission has invested a considerable amount of time and energy in attempting to determine which data elements pertinent to licensees should be available for the public, and which items should be confidential. The Commission believes that its recommendations constitute a careful balancing of the access rights of the public and the privacy rights of licensees. The Commission asserts that the public has a right to have access to basic directory information about a licensee, should it need to contact the licensee. The Commission believes, however, that under usual circumstances, the business address and business telephone number should be disclosed rather than residential data. If, however, the board cannot furnish the business address, it should make the licensee's home address available to the public. The Commission furthermore asserts that the public has a right to examine a licensee's educational and occupational background and professional qualifications. Before hiring a plumber, for example, an individual

should have the right to assess the plumber's credentials as presented to the Department of Licensing and Regulation. The Commission also believes that the public has a right to know the nature of non-pending complaints directed to boards against specific licensees. If a board has determined that a licensee was guilty or culpable of some unfair or illegal practice and subsequently took disciplinary action against that licensee, the public has a right to know that as well. Finally, if a licensee is required by statute to provide evidence of financial responsibility, that evidence should also be available for public inspection. This latter issue is of particular importance in the home improvement field.

The Commission does not believe that the release of other personally identifiable information pertinent to licensees would serve the public interest.... The Commission recognizes that there may be extenuating circumstances in which a compelling public purpose would be served by the release of data in addition to that recommended by the Commission. The Commission believes that discretionary authority should be given to records' custodians to release additional data; however, custodians should be required to issue rules and regulations explaining the need and the basis for disclosure.

Governor's Information Practices Commission, Final Report 535-38 (1982). The Department of Labor, Licensing, and Regulation has concluded that "a compelling public interest" is served by disclosure of, among other information, the number, nature, and status of complaints against a licensee, if the requester is contemplating a contract with the licensee. COMAR 09.01.04.13. As noted above, this exemption applies to licensees who are individuals and not to business entities. 71 *Opinions of the Attorney General* 305, 311 (1986). A 2006 amendment of the exemption limits disclosure of the home address of a licensee if the location is identified as the home address of an individual with a disability.

6. Records Containing Investigatory Procurement Information

SG §10-617(i) prohibits the disclosure of any part of a public record that contains procurement information generated by the federal government or another state as a result of an investigation into suspected collusive or anticompetitive activity on the part of a transportation contractor. The reason for the exemption was explained as follows:

The Department of Transportation advises that if it receives the result of an investigation into suspected bid rigging activity on the part of a potential contractor, which investigation was conducted by the federal government or another State, that information is subject to disclosure under the Maryland Public Information Law. As a result, these sources have been unwilling to share this information with Maryland officials.

House Bill 228 would provide assurances to these sources that the information provided to Maryland investigators will remain confidential and not be subject to disclosure. Section 10-617 of the State Government Article, to which the bill is drafted, limits access to a part of a public record. This means that the results of the Maryland investigation would be public information, except for those parts which relate to the information gathered from the confidential sources. As a result, the MDOT will have access to a greater range of information when conducting its own investigation into collusive or anticompetitive activity.

Bill Analysis, House Bill 228 (1994).

7. Miscellaneous Information

Other public information protected under SG §10-617 includes:

- Information about security of information systems – SG §10-617(g).
- Certain information about the application and commission of a notary public – SG §10-617(j).
- Social security numbers provided in applications for marriage licenses or recreational licenses issued under the Fish and Fisheries title of the Natural Resources Article – SG §10-617(k).
- Information that identifies or contains personal information about a person, including a commercial entity, that maintains an alarm or security system - SG §10-617(l).

D. Discretionary Exceptions

Under SG §10-618, a custodian *may* deny the right of inspection to certain records or parts of records, but only if disclosure would be contrary to the “public interest.” These records are:

- Interagency or intra-agency memoranda or letters that would be privileged in litigation – SG §10-618(b).
- Testing records for academic, employment, or licensing examinations – SG §10-618(c).
- Specific details of a research project that an institution of the State or of a political subdivision is conducting – SG §10-618(d).
- Contents of a real estate appraisal made for a public agency about a pending acquisition (except from the property owner) – SG §10-618(e).
- Records of investigation, intelligence information, security procedures, or investigatory files – SG §10-618(f).
- Site-specific location of certain plants, animals, or property – SG §10-618(g).
- Information relating to an invention owned by a State public institution of higher education – SG §10-618(h).
- Information relating to a trade secret, confidential commercial information, or confidential financial information owned by the Maryland Technology Development Corporation or by a public senior higher educational institution – SG §10-618(i).
- Plans and procedures relating to emergency procedures and records relating to buildings, facilities, and infrastructure, the disclosure of which would jeopardize security, facilitate planning of a terrorist attack, or endanger life or physical safety – SG §10-618(j).
- Records reflecting rates for certain services and facilities held by the Maryland Port Administration and research concerning the competitive position of the port – SG §10-618(k).

- Records of University of Maryland University College concerning the provision of competitive educational services – SG §10-618(l).
- Records of a public institution of higher education that contain personal information about a student – SG §10-618(m).

A “person in interest,” generally the person who is the subject of the record, SG §10-611(e), has a greater right of access to the information contained in investigation and testing records. SG §10-618 (c) and (f). *See* Chapter II.A, above.

Whether disclosure would be “contrary to the public interest” under these exceptions is in the custodian’s “sound discretion,” to be exercised “only after careful consideration is given to the public interest involved.” 58 *Opinions of the Attorney General* 563, 566 (1973). In making this determination, the custodian must carefully balance the possible consequences of disclosure against the public interest in favor of disclosure. 64 *Opinions of the Attorney General* 236, 242 (1979).

1. Inter- and Intra-Agency Memoranda and Letters

SG §10-618(b) allows a custodian to deny inspection of “any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.” This exemption “to some extent reflects that part of the executive privilege doctrine encompassing letters, memoranda, or similar internal government documents containing confidential opinions, deliberations, advice or recommendations from one governmental employee or official to another for the purpose of assisting the latter official in the decision-making function.” *Office of the Governor v. Washington Post Company*, 360 Md. 520, 551, 759 A. 2d 249 (2000). *See also* 66 *Opinions of the Attorney General* 98 (1981) (executive agency budget recommendations requested by and submitted to the Governor in confidence are subject to executive privilege). This privilege arose from the common law, the rules of evidence, and the discovery rules for civil proceedings. *Stromberg Metal Works, Inc. v. University of Maryland*, 382 Md. 151, 163, 854 A.2d 1220 (2004).

This exception is very close in wording to the FOIA exemption in 5 U.S.C. §552(b)(5), and the case law developed under that exemption is persuasive in interpreting SG §10-618(b). *Stromberg* at 382 Md. 163-64; 58 *Opinions of the Attorney General* 53 (1973). The FOIA exemption is “intended to preserve the process of agency decision-making from

the natural muting of free and frank discussion which would occur if each voice of opinion and recommendation could be heard and questioned by the world outside the agency.” 1 O’Reilly, *Federal Information Disclosure* §15.01 (3d ed. 2000); *see also Stromberg*, 382 Md. at 164.

To be an “interagency” or “intra-agency” letter or memorandum, the document must have been “created by government agencies or agents, or by outside consultants called upon by a government agency ‘to assist it in internal decisionmaking.’” *Office of the Governor*, 360 Md. at 552. Memoranda exchanged with federal agencies or agencies of other states as part of a deliberative process may fall within this exception. *Gallagher v. Office of the Attorney General*, 141 Md. App. 664, 676, 787 A.2d 777 (2001).

This exception does not apply to all agency documents. A document such as a telephone bill or a listing of persons who have appointments with an official cannot be considered a “letter or memorandum” under the “ordinary meaning” of those terms. *Office of the Governor*, 360 Md. at 552. Nor does the exception apply to all memoranda or letters. For it to apply, the agency must have a reasonable basis for concluding that disclosure would inhibit creative debate and discussion within or among agencies or would impair the integrity of the agency’s decision-making process. *NLRB v. Sears*, 421 U.S. 132, 151 (1975).

Generally, the exception protects pre-decisional, as opposed to post-decisional, materials. *Stromberg*, 382 Md. at 165; *City of Virginia Beach v. Department of Commerce*, 995 F.2d 1247 (4th Cir. 1993); *Bristol-Myers Co. v. FTC*, 598 F.2d 18, 23 (D.C. Cir. 1978). For example, a State agency’s annual report on waste, fraud, and abuse submitted to the Governor is protected as a pre-decisional document, because it presents the Governor with recommendations for correcting these problems that the Governor may approve or disapprove; it does not reflect agency policy or an agency’s final opinion. Letter to Anthony Verdecchia, Legislative Auditor, from Mary Ann Saar, Director of Operations in the Office of the Governor (July 17, 1990). Once an agency’s decision has been made, the records embodying the decision or policy, and all subsequent explanations and rationales, are available for public inspection. Pre-decisional, deliberative materials remain protected, however, even after the final decision is made. *May v. Department of the Air Force*, 777 F.2d 1012 (5th Cir. 1985) (so long as the information in question was created prior to the particular decision that was involved, it can retain its privileged status long after the decision-making process has concluded).

The exception is also meant to cover only the deliberative parts of agency memoranda or letters. Generally, it does not apply to records that are purely objective or factual or to scientific data. *Stromberg Metal Works, Inc., v. University of Maryland*, 382 Md. 151, 166-67, 854 A.2d 1220 (2004); *EPA v. Mink*, 410 U.S. 73 (1973). Factual information is not disclosable, however, if it can be used to discover the mental processes of the agency, *Dudman Communications Corp v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); reflects “investigative facts underlying and intertwined with opinions and advice,” *Office of the Governor*, 360 Md. at 559 (quoting *Hamilton v. Verdow*, 287 Md. 544, 565 (1980)); or when disclosure of the information might deter the agency from seeking valuable information, *Quarles v. Department of the Navy*, 893 F.2d 390 (D.C. Cir. 1990). In addition, “facts obtained upon promises or understandings of confidentiality, investigative facts underlying and intertwined with opinions and advice, and facts the disclosure of which would impinge on the deliberative process” may also be encompassed by the exemption. *Stromberg* 382 Md. at 166 (quoting *Hamilton v. Verdow*).

Both SG §10-618(b) and the FOIA exemption have also been construed to protect on a temporary basis some time-sensitive government-generated confidential commercial information. *Stromberg*, 382 Md. at 167-70; *Federal Reserve System v. Merrill*, 443 U.S. 340 (1979).

The exemption also covers materials protected under the attorney work-product doctrine. *Caffrey v. Dep’t. of Liquor Control for Montgomery County*, 370 Md. 272, 298, n. 15, 805 A.2d 268 (2002). Under the Maryland Rules, attorney work product materials are discoverable only upon showing substantial need. Md. Rule 2-402(c). Because attorney work product is not routinely discoverable, for purposes of the PIA, it is not considered “available by law to a party in litigation with the agency.” *Gallagher v. Office of the Attorney General*, 141 Md. App. 664, 673, 787 A.2d 777 (2001), citing *Cranford v. Montgomery County*, 300 Md. 759, 772-773, 481 A.2d 221 (1984).

The difficulty of applying the SG §10-618(b) exception to the myriad of agency-generated documents is obvious. We suggest that a presumption of disclosure should prevail, unless the responsible agency official can demonstrate specific reasons why agency decision-making may be compromised if the questioned records are released. In applying the deliberative process privilege, an agency should determine whether disclosure of the requested information “would actually inhibit candor in the decision-making process if made available to the public.” *Army Times Publishing Co. v. Department of the Air Force*, 998

F.2d 1067 (D.C. Cir. 1993). Unless specific reasons can be articulated, the agency decision to withhold documents may be overturned by the courts.

In *Cranford v. Montgomery County*, 300 Md. 759, 481 A.2d 229 (1984), the Court of Appeals vacated a decision by the Court of Special Appeals upholding an agency's decision to withhold documents. The Court of Appeals stated that the agency's proffered justification was too general and conclusory. It recognized the value of what has come to be called a *Vaughn* index, after the leading federal case, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The Court of Appeals also cited the failure of the courts below to analyze the agency memoranda exemption in relationship to discovery of particular documents and suggested that the lower courts had put too much emphasis on the public policy justification for nondisclosure. The Court agreed that reports prepared by outside consultants in anticipation of litigation are not routinely discoverable and may be protected from disclosure under the inter-agency and intra-agency documents exemption. *Cranford*, 300 Md. at 784. If the expert who made the report is to be called at trial, however, the report is not protected, because it is discoverable under Rule 2-402(f), which requires a party to "produce any written report made by the expert concerning those findings and opinion" 300 Md. at 775.

Maryland Attorney General opinions on this exception are 58 *Opinions of the Attorney General* 53 (1975) and No. 75-202 (December 1, 1975) (unpublished). Sources on the scope and extent of the FOIA exemption are: 1 Davis and Pierce, *Administrative Law Treatise* (3rd ed. §5.11); 1 O'Reilly, *Federal Information Disclosure*, Ch. 15 (3d ed. 2000); and 168 A.L.R. Fed. 143.

2. Testing Data

SG §10-618(c) allows a custodian to deny access to testing data for licensing, employment or academic examinations. For promotional examinations, however, a person who took the exam is given a right to inspect, but not copy, the examination and its results.

3. Research Projects

The specific details of an ongoing research project conducted by an institution of the State or a political subdivision (*e.g.*, medical research project) need not be disclosed by the custodian. SG §10-618(d). Only the name, title, expenditures, and the time when the final project summary will be available must be disclosed. See 58 *Opinions of the Attorney General* 53, 59 (1973) for an application of this exception to a consultant's report. See also

Letter to Leon Johnson, Chairman, Governor's Commission on Migratory and Seasonal Labor, from Assistant Attorney General Catherine M. Shultz (August 8, 1985) (census information revealing individual migrants' names may be protected under this subsection.)

4. Real Estate Appraisals

Under SG §10-618(e), the contents of a real estate appraisal made for a covered governmental entity need not be disclosed until title has passed to that entity. However, the contents of the appraisal are available to the owner of the property at any time, unless some other statute would prohibit access.

5. Investigatory Records

SG §10-618(f) permits the withholding of certain investigatory records and records that contain intelligence information and security procedures. The determinations required of the custodian vary depending on the particular records at issue.

For seven named law enforcement agencies, the custodian may deny the right of inspection of records of investigations conducted by the agency, intelligence information, or security procedures. The seven listed agencies are: any sheriff or police department, any county or city attorney, a local correctional facility, State's Attorney, or the Attorney General's office. Although not listed in SG §10-618(f)(1), the State Prosecutor is considered in the same category as a State's Attorney. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999). Many records received or created by law enforcement agencies may fall within this category. *See, e.g., 92 Opinions of the Attorney General* 26 (2007) (mug shot considered an investigatory record).

Not every record in the possession of the law enforcement agency constitutes a record of an investigation. *See, e.g., 71 Opinions of the Attorney General* 288 (1986) (recordings of 911 calls generally not investigatory records); *63 Opinions of the Attorney General* 543 (1978) (arrest logs not investigatory records).

When the records in question are investigatory, and when they come from one of these enumerated agencies, the exception applies without need for an actual showing that the records were compiled for law enforcement or prosecution purposes. The Court of Appeals has held that the investigatory records of one of the seven enumerated agencies are presumed to be for law enforcement purposes. *Superintendent v. Henschen*, 279 Md. 468, 369 A.2d

558 (1977). *See also Blythe v. State*, 161 Md. App. 492, 525-26, n.6, 870 A.2d 1246 (2005). Thus, an enumerated agency need not make a particularized showing of a law enforcement purpose to justify the withholding of a record relating to a criminal investigation. *See Office of the State Prosecutor*, 356 Md. 118. However, once an investigation is closed, disclosure is less likely to be “contrary to the public interest” and courts will require a more particularized factual basis for a “public interest” denial. *City of Frederick v. Randall Family, LLC*, 154 Md. App. 543, 562-567, 841 A.2d 10 (2004); *Prince George’s County v. Washington Post Co.*, 149 Md. App. 289, 333, 815 A.2d 859 (2003).

On the other hand, the investigatory files of other agencies are exempt from disclosure only if there is a demonstration that the agency compiled them for a law enforcement, judicial, correctional, or prosecution purpose. Where files are prepared in connection with government litigation, and adjudicative proceedings are currently under way or contemplated, they are compiled for law enforcement purposes. *Equitable Trust Co. v. State Human Relations Comm’n*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev’d on other grounds*, 287 Md. 80 (1980); Letter of Assistant Attorney General Robert A. Zarnoch to Senator Nathaniel J. McFadden and Delegate Stephen J. DeBoy, Sr., (November 8, 2007) (investigations by State Ethics Commission), *but cf. 71 Opinions of the Attorney General* 305, 313-14 (1986) (agency’s citizen response plan log ordinarily not an investigatory file). An agency, however, has the burden of demonstrating that it meets this criterion. *Fioretti v. State Board of Dental Examiners*, 351 Md. 66, 82, 716 A.2d 258 (1998) (“The agency must, in each particular PIA action, demonstrate that it legitimately was in the process of or initiating a specific relevant investigative proceeding in order to come under the aegis of the exemption.”) Even if the agency makes such a showing, when the agency asserts that disclosure would “prejudice an investigation,” the agency may be required to make a particularized showing of prejudice. *Fioretti*, 351 Md. at 86-91; *but see Fioretti*, 351 Md. at 91-95 (Raker, J., concurring) (characterizing latter holding as “dicta”). *See also Bowen v. Davison*, 135 Md. App. 152, 761 A.2d 1013 (2000). For further discussion of satisfying the agency’s burden when withholding investigatory records, *see* Chapter IV.F.3, below.

In carrying out its statutory function, an agency might have records obtained from investigatory files of another agency. In these circumstances, it is appropriate for the agency to withhold investigatory materials if the agency that provided the information would itself deny access under the investigatory records exemption. 89 *Opinions of the Attorney General* 31, 44 (2004) (addressing records of the Office of the Independent Juvenile Justice Monitor collected in the investigation of Department of Juvenile Services’ facilities).

Maryland's current investigatory records exception is similar to the investigatory records exemption in FOIA, 5 U.S.C. §552(b)(7), and the case law developed under that exemption should be of assistance in interpreting SG §10-618(f). *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 474 A.2d 880 (1984). FOIA cases also discuss criteria for determining whether a record was compiled for law enforcement purposes. *See, e.g., Rosenfeld v. Department of Justice*, 57 F.3d 803 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996) (where compiling agency has clear law enforcement mandate, government has easier burden to establish that record it seeks to withhold was compiled for law enforcement purposes; under these circumstances, the government need only establish rational nexus between the enforcement of federal law and the document for which the law enforcement exemption is claimed). *See also* 55 A.L.R. Fed. 583.

A custodian of investigatory records must nonetheless disclose them to any person, unless the custodian determines that disclosure would be "contrary to the public interest" or unless other law would prevent disclosure. For example, the Court of Appeals held that it would be contrary to the public interest to disclose an internal investigation report of a police officer by the Baltimore City Police Department. Disclosure of an internal report would discourage witnesses or other persons with information from cooperating. *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 617 A.2d 1040 (1993). *See also* 77 *Opinions of the Attorney General* 183 (1992) (custodian of an investigatory record containing the name and address of a crime victim would be required under the PIA to consider the assertions of the public interest made by the requester, as well as the privacy interests of the victim); 64 *Opinions of the Attorney General* 236 (1979) (police department need not disclose police investigative report to the extent that disclosure would be contrary to the public interest). In justifying the denial of a request for an investigatory record under SG §10-618(f)(1), the courts have recognized a distinction based on whether an investigation is ongoing or closed. While an investigation is ongoing or defendant is awaiting trial, the public interest justification is obvious.

Under SG §10-618(f)(2), however, the "person in interest" is entitled to inspect investigatory records of which he or she is the subject unless production would:

- (a) interfere with valid and proper law enforcement proceedings;
- (b) deprive another person of a right to a fair trial or an impartial adjudication;

- (c) constitute an unwarranted invasion of personal privacy;
- (d) disclose the identity of a confidential source;
- (e) disclose investigate techniques or procedures;
- (f) prejudice an investigation; or
- (g) endanger the life or physical safety of an individual.

See generally *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 617 A.2d 1040 (1993); *Briscoe v. Mayor and City Council of Baltimore*, 100 Md. App. 124, 640 A.2d 226 (1994); 82 *Opinions of the Attorney General* 111 (1997); 81 *Opinions of the Attorney General* 154 (1996). Because of a person in interest's favored status, a custodian must point out precisely which of the seven grounds enumerated in SG §10-618(f)(2) justify the withholding of an investigatory record and explain precisely why it would do so. *Blythe v. State*, 161 Md. App. 492, 531, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005).

The number and wide scope of these factors will often lead to a denial of disclosure by the law enforcement agency, especially where records have been recently obtained and are in active use in investigations. The seven factors listed above may also be considered as part of the "public interest" determination in deciding whether to deny access to a person who is not a person in interest. *See National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004) (request for death-scene photographs of White House Counsel properly denied under FOIA investigatory records exception in light of privacy interest of the decedent's family). Indeed, under limited circumstances one of these factors might even justify an agency's refusal to confirm or deny that a record exists. *Beck v. Department of Justice*, 997 F.2d 1489 (D.C. Cir. 1993) (personal privacy of drug agent would be needlessly invaded if agency confirmed that record of misconduct investigation existed). Other reasons not listed could also justify nondisclosure to a person who is not a person in interest. 64 *Opinions of the Attorney General* 236 (1979).

The focus of the provision that protects the identity of a confidential source is not on the motivation of the requestor or the potential harm to the informant. "Rather, the purpose of the exception is to assist law enforcement officials in gathering information by ensuring reluctant sources that their identities would not be disclosed." *Bowen v. Davison*, 135 Md.

App. 152, 164, 761 A.2d 1013 (2000). The Supreme Court has held that a law enforcement agency is not entitled to a presumption that all sources supplying information to that agency in the course of a criminal investigation are “confidential sources” within the FOIA exception for investigatory records. Rather, only some narrowly defined circumstances provide a basis for inferring confidentiality, as when paid informants expect their information to remain confidential. *Department of Justice v. Landano*, 508 U.S. 165 (1993). Thus, there must be an express or implied assurance of confidentiality to the informant. *Bowen v. Davison*, 135 Md. App. at 164.

Although a “person in interest” is entitled to inspect certain investigatory records that may be denied to third parties, the person in interest’s rights under SG §10-618(f)(2) do not override other exemptions under the PIA that might justify withholding the records. *Office of the Attorney General v. Gallagher*, 359 Md. 341, 753 A.2d 1036 (2000).

6. Location of Plants, Animals, or Property

SG §10-618(g) allows a custodian to deny inspection of a record that contains the location of an endangered or threatened species of plant or animal, plants and animals in need of conservation, a cave, or an historic property. However, this provision does not authorize the denial of information requested by the property owner or by any entity authorized to take the property through condemnation.

7. Inventions Owned by Higher Education Institutions

Under SG §10-618(h), information disclosing or relating to an invention owned in whole or in part by a State public institution of higher education need not be disclosed for a limited period. The purpose of this exception is to allow the institution an opportunity to evaluate whether to patent or market the invention and pursue economic development and licensing opportunities. However, this exception does not apply if the information has been published or disseminated by the inventors in the course of their academic activities or if it has been disclosed in a published patent. The exception also does not apply if the invention has been licensed by the institution for at least four years, or if four years have elapsed from the date of the written disclosure of the invention to the institution.

8. Certain Proprietary Information Owned by the Maryland Technology Development Corporation or Senior Higher Education Institutions

SG §10-618(i) allows protection of trade secret, confidential commercial information, and confidential financial information owned, in whole or in part, by the Maryland Technology Development Corporation or by a public senior higher education institution (Morgan State University, St. Mary's College, and constituent institutions of the University of Maryland) in connection with economic development efforts and certain arrangements with the private sector.

9. Records Relating to Public Security

In the aftermath of September 11, 2001, the PIA was amended to prevent use of certain public records to advance terrorist activities. To the extent inspection would jeopardize security of any building, structure, or facility, endanger the life or physical safety of an individual, or facilitate the planning of a terrorist attack, SG §10-618(j) allows a custodian to deny inspection of the following public records:

- (1) response procedures or plans prepared to prevent or respond to emergency situations, if disclosure would reveal vulnerability assessments, specific tactics, or specific emergency or security procedures;
- (2) records prepared to prevent or respond to emergency situations that include certain information regarding medical or storage facilities or laboratories;
- (3) drawings, operational manuals, and other records of airports, mass transit facilities, certain transportation infrastructure, emergency response facilities, buildings where hazardous materials are stored, arenas and stadia, water and wastewater treatment systems, and any other building, facility, or structure if disclosure would reveal specified information relating to security; and
- (4) records of any other building, facility, or structure if disclosure would reveal life, safety, and support systems, surveillance

techniques, alarms or security systems or technologies, operational and evacuation plans or protocols, or personnel deployment.

The protection under this subsection does not extend to records relating to the inspection by the State or local governments, or citations issued by the State or local governments, of private-sector buildings, structures, or facilities, or records relating to such facilities that have experienced a catastrophic event.

There have not been any reported court decisions applying this exception. *See Police Patrol Security Systems, Inc. v. Prince George's County*, 378 Md. 702, 838 A.2d 1191 (2003) (holding that SG §10-618(j) would apply to a PIA request pending at the time of its enactment, but declining to decide whether the exception would bar disclosure of the records at issue).

In December 2007, the Office of the Attorney General reviewed the experience under the exception since 2002 and found that it had rarely been invoked by State or local agencies. *See Report of the Office of the Attorney General on the Public Security Exception of the Public Information Act* (December 2008), available on-line at <http://www.oag.state.md.us/Opengov/PIA_public_security_exemption_report.pdf>. The Attorney General recommended that the exception be maintained in the statute without amendment. *Id.*

In preparing the report, the Attorney General's Office noted that some agencies decided not to invoke the public security exception and allowed access to records covered by the exception when the requester agreed to certain conditions. First, one agency reported that it had considered asserting the exception to deny access to such records, but had instead allowed inspection of those records when the requester agreed to forgo requesting a copy. A second agency indicated that, in some circumstances in which it would otherwise assert the exception, it did not do so when the requester agreed to undergo a background check for certain sensitive records.

It might be argued that these approaches are at odds with the PIA. The PIA generally does not allow agencies to condition access to records on disclosure of the identity, affiliation, or purpose of the requester. *See* SG §10-614(c). Also, the general rule under the PIA is that the right to inspect a public record also includes the right to a copy of that record. *See* SG §10-613(a)(2) ("Inspection or copying of a public record may be denied only to the

extent provided under [the PIA]”); §10-620 (“an applicant who is authorized to inspect a public record may have ...a copy, printout, or photograph of the public record”).

However, the practical compromises devised by these agencies may allow greater access to records than might otherwise occur – *i.e.*, the custodian might otherwise deny access to the records altogether under SG §10-618(j) without some assurances as to the identity and background of the individual requesting the record or with the possibility of copies of the entire record circulating outside the agency.

The statutory language accommodates these approaches. SG §10-618(j) authorizes a custodian to deny inspection of specified types of records related to public security “only to the extent” that inspection threatens public security in certain specified ways – jeopardizes building or facility security, facilitates the planning of terrorist attack, or endangers life. Among the exceptions in the PIA, this exception is unusual in that it requires the custodian to assess, in light of the particular circumstances, the “extent” to which an adverse outcome will result from inspection. (The other exceptions in the PIA that employ the phrase “only to the extent” are SG §10-617(j) (records relating to notary publics) and SG §10-618(f) (investigatory records). In both of those instances a custodian may deny a “person in interest” access to the specified records “only to the extent” that certain enumerated harms could occur – *e.g.* disclosure of a confidential source.) The custodian’s judgment inevitably depends on both the nature of the record and on other information available to the custodian. Although a custodian cannot require a requester to provide any information or assurances beyond the requirements of the PIA, the custodian may reasonably take into account any information that the requester voluntarily provides that could affect that judgment.

For example, there may be records that fall within SG §10-618(j) and that the custodian reasonably believes should not be generally available for public inspection in full because they would facilitate a terrorist attack. Under the PIA, a requester is not required to undergo a background check and a custodian of records cannot insist on one. However, if the requester voluntarily undergoes such a background check, the custodian may have additional information from which he or she may reasonably conclude that the inspection of those records is not likely to be used for that purpose. In this respect, the public security exception is unlike other exceptions in the PIA, which generally do not require the custodian to assess “the extent” to which inspection will result in an adverse outcome and thus generally do not allow for different decisions on access depending on information independent of the record itself that is available to the custodian. Massachusetts has adopted a similar approach in construing a public security exception recently added to its public

records law. *See* Massachusetts Supervisor of Public Records, Bulletin No. 04-03 (April 1, 2003) (although a custodian ordinarily may not inquire as to the identity and motive of a requester, a custodian who would otherwise deny access under the public security exception may solicit information from the requester and, if the requester voluntarily provides that information, grant access).

10. Competitive Position of the Port

In order to protect the competitive position of the Port of Baltimore, SG §10-618(k) allows a custodian to deny any part of a public record reflecting rates or proposed rates for stevedoring or terminal services or use of facilities that are generated by, received by, or negotiated by the Maryland Port Administration or by a private operating company established by the Port Administration. Proposals aimed at increasing waterborne commerce through Maryland ports as well as research and analysis relating to maritime businesses or vessels compiled to evaluate competitiveness also may be withheld.

11. University College – Competitive Services

SG §10-618(l) authorizes the withholding of certain public records relating to University of Maryland University College's competitive position with respect to educational services. It allows withholding part of a public record addressing fees, tuition, charges, and supporting information held by University College (other than fees published in catalogues and ordinarily charged students), proposals for the provision of educational services other than with its students, and research, analysis, or plans relating to University College's operations or proposed operations. Not protected under this provision are procurement records, records required by law or by the Board of Regents, and certain records related to the collective bargaining process.

12. Public Institutions of Higher Education – Personal Information

SG §10-618(m) authorizes a custodian at public university to withhold a portion of any records that contain "personal information" concerning a student, former student, or applicant if the records are requested for "commercial purposes." In this context, personal information means an address, telephone number, e-mail address and "directory information." The latter phrase is defined in federal law to include the student's name, address, telephone listing, date and place of birth, major field of study, and other information. *See* 20 U.S.C. §1232g(a)(5). In a departure from the PIA's general willingness to

accommodate informal requests, *see* SG §10-614(a), this exemption authorizes the custodian to require that a request be submitted in writing by first class mail. SG §10-618(m)(2)(i).

E. Special Court Orders – Preventing Disclosure Where No Exception Applies

A record required to be disclosed under the PIA may be withheld temporarily if the official custodian determines that disclosure would do “substantial injury to the public interest.” SG §10-619. The official custodian must, within 10 days of this denial, file an action in the appropriate circuit court seeking an order to permit the continued denial of access. The person seeking disclosure is entitled to notice of the action and has the right to appear and be heard before the circuit court. SG §10-619(c). An official custodian is liable for actual damages for failure to petition the court for an order to continue a denial of access under this provision. SG §10-623(d)(2).

After a hearing, the court must make an independent finding that “inspection of the public record would cause substantial injury to the public interest.” For example, the Circuit Court for Baltimore City concluded that potential competitive injury to the Port of Baltimore and BWI Airport justified withholding an agreement between the State and the government of Kuwait regarding the use of State facilities in the post-war reconstruction of Kuwait. *Evans v. Lemmon*, No. 91162022 (Cir. Ct. Balto. City July 31, 1991). On the other hand, the Court of Special Appeals concluded that Baltimore City had no basis under SG §10-619 to withhold documents concerning the construction of the Patapsco Waste Water Treatment Plant. The Court held that the tactical disadvantage that the City might suffer in arbitration proceedings with the construction company was insufficient to establish the substantial injury to the public interest needed to protect records under this section. *City of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683, *cert. denied*, 306 Md. 118, 507 A.2d 631 (1986).

Agencies should remember that, by seeking the SG §10-619 remedy, they are foreclosed from an administrative determination that the records sought are subject to a statutory exception (although the agency may not be barred from simultaneously seeking a declaratory judgment that an exception applies). In *Burke*, the Baltimore City Department of Public Works lost its right to continue to assert the inter/intra-agency exemption when it sought relief from disclosure under SG §10-619. *Burke*, 67 Md. App. at 152. Therefore, this remedy should be viewed as an extraordinary one, requiring careful consultation with counsel before a decision is made to bring a SG §10-619 action.

F. Severability of Exempt from Non-Exempt

The fact that some portions of a particular record may be exempt from disclosure does not mean that the entire record may be withheld. *Blythe v. State*, 161 Md. App. 492, 519, 870 A.2d 1246, *cert. granted*, 388 Md. 97, 879 A.2d 42 (2005). If a record contains exempt and non-exempt material, the custodian must permit inspection of any “reasonably severable” non-exempt portion of a record. SG §10-614(b)(3)(iii). If exempt portions of the document are inextricably intertwined with nonexempt portions, however, so that excision of the exempt information would impose significant costs on the agency and the final product would contain very little information, then the agency may deny inspection of the record. *See Nadler v. Department of Justice*, 955 F.2d 1479 (11th Cir. 1992) (factual material may be withheld when it is impossible to segregate it in a meaningful way from deliberative information.) *See also Newfeld v. IRS*, 646 F.2d 661 (D.C. Cir. 1981). If the agency decides that non-exempt information is not reasonably segregable, it has the burden of showing this in a non-conclusory affidavit. *Wilkinson v. FBI*, 633 F. Supp. 336 (C.D. Cal. 1986).

G. Relationship of Exceptions to Discovery

Demands on custodians for documents for civil or criminal trials raise questions about the relationship of judicial discovery rules to the SG §§10-616, 10-617 and 10-618 exceptions. *See Tomlinson, The Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119 (1984). For instance, must an agency resist discovery where the information sought is protected from disclosure by a mandatory or discretionary exception? The limited guidance in the case law is somewhat inconsistent.

In *Boyd v. Gullett*, 64 F.R.D. 169 (D. Md. 1974), the court held that the exceptions in the PIA do not create privileges for purposes of the federal discovery rules. In reaching this decision, the court relied on analogous cases under FOIA:

The intention of Congress and presumably the Maryland Legislature was to increase public access to government information. Both acts provide that “any person” has the right to non-exempt materials, and the exemptions are merely reasonable limitations on this broad right of “any person” to request information. It would not be reasonable to view such acts as creating new privileges where privileges never existed. Indeed, such an interpretation would result in a restriction of public access to government information. Such a paradoxical result

could not have been intended by the Maryland Legislature by its passage of [the PIA], and the Court is satisfied that the exemptions in the statute do not create privileges for the purposes of discovery.

64 F.R.D. at 177-78.

In *Baltimore City Police Department v. State*, 158 Md. App. 274, 857 A.2d 148 (2004), a defendant in a criminal case subpoenaed personnel records of a police officer. The police department moved to quash the subpoena on the ground that the records were made confidential by the PIA. The Court of Special Appeals treated the personnel records as “privileged material” and outlined a procedure for a trial court to determine the discoverability of such material – *i.e.*, whether the defendant’s need for it outweighed the officer’s privacy interest.

While a custodian, with advice of counsel, should make records available pursuant to appropriate civil discovery requests, care should be taken to protect records affecting individual privacy interests from broader disclosure than necessary by seeking, or inviting those who are affected to seek, protective orders limiting further disclosure of the record to the parties in the litigation. Often a protective order can be structured in such a manner that relevant information is provided but other information is protected from discovery thereby maximizing the protection of the PIA. Note that the General Assembly has explicitly made certain records not discoverable in civil or criminal trials. *See, e.g.*, §14-410 of the Health Occupations Article.

Just as the PIA does not narrow the scope of discovery, neither does the PIA expand it. In *Faulk v. State’s Attorney for Harford County*, 299 Md. 493, 474 A.2d 880 (1984), the Court of Appeals held that the PIA does not expand the right of discovery available to a criminal defendant under Maryland Rule 741 (current Rule 4-263); *see also Office of Attorney General v. Gallagher*, 359 Md. 341, 347-48, 753 A.2d 1036 (2000). The pendency of criminal proceedings triggers the SG §10-618(f) exemption, which shields investigatory records from disclosure to an accused. The Court adopted the reasoning of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the Supreme Court stated that FOIA was not intended to function as a private discovery tool.

When a prosecutor provides a defendant with discovery in compliance with the court rules on discovery, the prosecutor is not responding to a PIA request. Accordingly, there is no basis under the PIA for charging a fee for mandatory discovery. 93 *Opinions of the*

Attorney General 138 (2008). To the extent that a prosecutor provides services or materials not required by the discovery rules in response to a defense request, there may be a justification under the PIA to charge fees. *Id.*

The PIA is sometimes used by those involved in administrative proceedings where formal discovery may or may not be available. Because the PIA establishes a statutory right to public records, a person's right to access such records may not be conditioned upon the person's voluntary participation in a deposition in connection with an administrative proceedings unless some provision of the PIA itself justifies withholding the requested record. *See, e.g., Hammen v. Baltimore County Police Dep't.*, 373 Md. 440, 818 A.2d 1125 (2003).

H. Reverse PIA Actions

A special feature of the exceptions in SG §§10-616 and 10-617 is that they impose an obligation on the custodian to deny inspection of the listed records or information: "Unless otherwise provided by law, a custodian *shall* deny inspection of a public record ..." (emphasis added). If the custodian decides to release information or records that might be covered by SG §§10-616 or 10-617, the question arises whether the subject of a record or the person submitting a record may bring suit to prevent such a disclosure. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court decided that FOIA does not afford a private right of action to prohibit disclosure of information covered by 5 U.S.C. §552(b). Rather, a reverse FOIA action is generally brought under the federal Administrative Procedures Act, with the claim that the agency's decision to release the document was "arbitrary and capricious."

SG §§10-616 and 617 differ from FOIA in this significant respect: the PIA prohibits the disclosure of the records, whereas FOIA allows disclosure even if an exemption could be asserted. Consequently, a "reverse PIA" action (one to prevent rather than allow disclosure) may be authorized in Maryland despite the *Chrysler* case. If a custodian proposes to release a document arguably covered under SG §§10-616 or 10-617, the custodian should usually contact the person potentially affected by release so that the person may advise the custodian of his or her views and potentially seek judicial intervention to protect the record from disclosure. In the event of judicial intervention, the custodian or the agency should produce an administrative record that reveals why it decided to release the document, if that document may be covered under SG §§10-616 or 10-617. *Cf. Reliance Elec. v. Consumer Product Comm'n*, 924 F.2d 274 (D.C. Cir. 1991).